1983

Richard A. Isaacson v. Clair Dorius et al : Brief of Respondents in Response to Jurisdictional Issue Contained in Reply Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RICHARD A. ISAACSON,	)	
Plaintiff and Respondent,	)	
vs.	)	
CLAIR DORIUS,	)	
Defendant and Appellant,	)	
and	)	Case No. 18166
LAWRENCE W. LYNN,	)	
Plaintiff and Respondent,	)	
vs.	)	
CLAIR DORIUS,	)	
Defendant and Appellant.	)	
	)	

RESPONDENTS' BRIEF IN RESPONSE TO JURISDICTIONAL ISSUE CONTAINED IN REPLY BRIEF OF APPELLANT

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INTRODUCTORY STATEMENT

Order Denying Motion for New Trial was entered in the trial court on November 13, 1981. Defendant and appellant filed his Notice of Appeal on December 16, 1981. On December 31, 1981, plaintiffs and respondents made a Motion in this Court to Dismiss this appeal for lack of jurisdiction for the reason that the said Notice of Appeal was not timely filed. This Court denied said motion after hearing on June 18, 1982, "without prejudice to raise as an issue on appeal."

The issue of jurisdiction was raised as an issue on appeal by respondents in their Brief Raising Jurisdictional Issue, which was set forth as Point II in the Brief of Respondents filed herein.

Appellant has filed a response to that jurisdictional issue in a brief entitled Reply Brief of Appellant, served by mail on December 31, 1982. In fact, the said Reply Brief is devoted entirely to the jurisdictional issue raised by respondents. Thus, had appellant filed a reply brief on the non-jurisdictional issues, respondents would have no right to further respond by brief thereto. However, since respondents have raised the jurisdictional issue, and appellant has responded thereto, respondents properly have the right to reply to the material raised by the appellant on the jurisdictional issue, and respondents respectfully submit the following as their response thereto.

ARGUMENT

POINT I. NOTICE OF APPEAL OF DEFENDANT AND APPELLANT, CLAIR DORIUS, WAS NOT TIMELY.

Appellant attempts to establish the timeliness of his appeal by resort to two arguments as follows:

(1) Appellant claims that Section 63-37-1, et seq., Utah Code Annotated, 1953, as amended, applies to the courts and must be construed as providing that the Notice of Appeal mailed to the Clerk of the Court shall be deemed filed when mailed; and

(2) Appellant claims that he is entitled to the benefit of Rule 6(e), Utah Rules of Civil Procedure, in this case and is thus entitled to one month and three days in which to file Notice of Appeal.

We desire to deal briefly with each of these propositions.

(1) SECTION 63-37-1, ET SEQ., IS NOT APPLICABLE TO THE COURTS.

Appellant appears to concede that Rule 73(a), Utah Rules of Civil Procedure, grants appellant one month in which to appeal and appears to concede that that rule requires that the appeal be filed with the District Court. The argument then proceeds that Rule 5(e) defines filing as being filed with the Clerk of the Court and the argument then proceeds that, since the Clerk of the Court is also the County Clerk, and since the County is a political subdivision, then therefore the County Clerk is a sort of political subdivision, and therefore papers sent to this Clerk pursuant to said Section 63-37-1, et seq., must be deemed filed when mailed.

We respectfully submit that that result does not follow at all. Article VIII, Section 14 of the Constitution of Utah provides that the County Clerks "shall be ex officio clerks of the District Courts." Thus, these Clerks duly have a dual role. They are County Clerks and as such carry out a role in county government, and they are Clerks of the Court and as such are an integral part of the court system. This dual role is clearly spelled out in Section 17-20-1, Utah Code Annotated, 1953, as amended, where it

provides that the County Clerk is "clerk of the district court" and is "clerk of the board of county commissioners." In Section 17-20-2 the Clerk's duties as Clerk of the Court are enumerated, and in Section 17-20-4 the Clerk's duties as County Clerk are enumerated. As Clerk of the Court he is no doubt under the jurisdiction and control of the judicial branch, and as County Clerk, he can no doubt be considered a part of county government and subject to its rules. Procedures on the county side of his job do not become a part of the judicial branch merely because the Clerk has a dual role. Thus, even if Section 63-37-1, et seq., is applicable to the County Clerk in his county role, it does not apply to him as Clerk of the Court, and certainly not in contravention of the rules of court. Appellant himself concedes at page 6 of his brief that:

> "It is obvious that the Courts are a separate branch of government under the separation of powers of the Constitution of the State of Utah and as such, are not controlled by the legislative pronouncements."

That admission appears to be dispositive of the matter.

In addition, however, the fact that the courts are nowhere mentioned in Section 63-37-1, et seq., compels the conclusion that the courts were not intended to be covered by it, and this same result is compelled when one considers the rather absurd consequences that would result in the courts if mailing to the courts were to be held to be the equivalent of filing with the courts. Let us briefly consider some provisions of Utah Rules of Civil Procedure that would be affected if mailing to the court were to be held to

be the equivalent of filing with the court.

Rule 3(a), URCP. This rule provides that an action can be commenced by filing a complaint or by service of summons. If Section 63-37-1 were applicable, then the complaint would be filed when mailed to the court. Of course, one might raise the objection that the complaint should not be deemed filed until the fee for filing were actually paid. However, Section 63-37-1 also applies to "any payment required or authorized to be filed or made to the state of Utah, or to any political subdivision thereof." Thus, under Section 63-37-1, a complaint mailed to court with the proper fee would be deemed filed when mailed, notwithstanding it might not be received by the Clerk for some days and perhaps for months if it went astray. This could create some considerable difficulty in many areas, not the least of which could be in connection with the Statutes of Limitation. What has been said with respect to commencing a suit by filing a complaint would apply with equal force to the filing of a complaint after service of a ten-day summons. Under present practice, if a ten-day summons is served, but the complaint is not filed within ten days, the action is deemed dismissed. However, it mailing equals filing, then the status of the case could be up in the air for a considerable period of time if the complaint, filing fee and ten-day summons goes astray in the mail. It would, of course, be very easy for a party (we can assume that attorneys would not engage in any such practice) to assert that he had

actually mailed the documents to court earlier than they were actually mailed, and this procedure would at the very least impose upon the courts numerous hearings to determine the actual date of mailing, which would probably not be a salutary thing to inflict on the courts in view of their already overcrowded condition.

We desire also to call attention to the current form of summons (see Form 1 of Appendix to Forms of Utah Rules of Civil Procedure). The current form provides that the summons state, among other things, that defendant be notified that he is "hereby summoned and required to file an answer in writing to the attached complaint with the clerk of the above-entitled court, and to serve upon, or mail to . . . plaintiff's attorneys, a copy of said answer." Earlier forms of the summons required only that the answer be served within twenty days, but did not specify that the answer had to be filed with the twenty days. This created much uncertainty at court, particularly in connection with applications for default judgments. The requirement that the summons state that the answer be served and filed within the twenty days no doubt sought to clarify this confusion. The position asserted by appellant, however, would return us to that state of confusion. If mailing is the equivalent of filing, then a defendant could serve a copy of the answer to his opponent and mail the original to the court. The court, however, would still not necessarily know on the twenty-first day whether an

answer had been properly made. Given the current postal service, one can suppose that answers would come drizzling in one, two, three or more days beyond the twentieth day, creating no end of confusion.

Rule 5(d), URCP. This rule now contemplates no doubt a physical filing of the papers with the court, but would hereafter have to be construed as meaning that a party would only have to mail the papers to court to satisfy the requirements of this rule.

Rule 5(e), URCP. As presently written, this rule provides that papers can be filed with the judge. One supposes that if mailing is the equivalent of filing, the papers mailed to the judge might be construed to be filed when mailed to the judge. Presumably different judges might construe this differently. Some judges might endorse on the paper the date of the postmark on the envelope; some might endorse thereon the date they received the paper; and some might decline to accept it at all. Other variations can be imagined, all of which would seem to create more confusion--rather than less.

Rule 14(a), URCP. Under this rule, a third-party plaintiff need not obtain leave to make service if he files a third-party complaint not later than ten days after he serves his original answer. If mailing means filing, we introduce into third-party practice further ambiguities.

Rule 31(c), URCP. Practice under this rule would be affected. However, instead of giving notice of filing, one could presumably meet the requirement here by giving notice of mailing to

the court.

Rule 38(b), URCP. This rule provides that jury trial may be obtained by paying the statutory fee and serving a demand. Since payments under 63-37-1, et seq., are effective when mailed, a jury could be demanded and paid for by mail, although the court might never receive the documents relating thereto, or in any event might receive them after some delay. Most, if not all, of the district courts have rules providing that demand for jury trial must be made a given number of days prior to trial (ten days for example) Under such a court rule, if the mail were delayed, the court might not receive the jury demand until so close to the date for trial that it would impose difficulties on the court in scheduling jury trial and in arranging for juries.

Rule 41, URCP. Under this rule a case can be dismissed by filing a notice of dismissal or by filing a stipulation of dismissal at court. If mailing is the equivalent of filing, then cases will be dismissed when notice of dismissal or stipulation is mailed, although the court may have no record thereof at the time of dismissal, and in some cases for some days thereafter, and in some instances for protracted periods of time if these items are lost in the mail. This could result in serious consequences, particularly in the area of real estate titles.

Rule 51, URCP. This rule provides for the filing of written requests for instructions. To hold that the same can be mailed results in an absurdity.

Rule 54(d)(2), URCP. This rule provides a memorandum of costs must be served and filed within a five-day period. Mailing this document to the court could again result in many ambiguities, which would not be conducive to the expeditious administration of justice.

Rule 58(a), URCP. This rule provides that judgments are deemed entered when they are signed and filed. We can assume that judges are usually present in the county in question when they sign judgments and that the same will therefore normally be filed without incident. However, in rural counties a judgment signed by a judge in one county and then mailed by him to the proper county would have to be deemed filed when mailed if mailing were held to be the equivalent of filing, and this could conceivably create serious problems in connection with land titles and in other areas as well.

Rule 68, URCP. Rule 68 provides for deposits in court and presumably under Section 63-37-1, et seq., if a check were mailed to the court, mailing would create a good deposit, notwithstanding the court had not yet received the same and might not for some time receive the same.

Appellate practice. The present practice requires filing of documents in connection with appeals to the Supreme Court in at least the following instances:

Rule 73(a), Notice of Appeal,

Rule 73(c), Bond on Appeal,

Rule 73(g), Record on Appeal,

Rule 73A, Docketing Statement,

Rule 75(a), Designation of Record,

Rule 75(a)(1), Certificate of Ordering Transcript,

Rule 75(b), Filing Transcript,

Rule 75(p)(1), Filing Appellant's Brief, Respondent's Brief and Reply Briefs,

Rule 76(e)(1), Petition for Rehearing,

Rule 76(e)(2), Answer to Petition for Rehearing,

Rule 76(d) and

Rule 54(d)(3), Time for Seeking Costs After Filing of Remittitur.

If Section 63-27-1, et seq., imposes on the courts the rule that mailing is the equivalent of filing, then all of the foregoing steps in the appellate procedure will satisfactorily be met by litigants' mailing the items in question to the court. The effective date would be the date of mailing, not the date of filing. Compliance with the rules of the court would be much more difficult and ambiguities as to when an item was filed would be multiplied many times over. There would be practically no certainty as to when any step were taken as that step would always be subject to proof that the item in question had been mailed, notwithstanding it was not received by the Supreme Court at any particular time. One can imagine that this court, if it sought to attempt to enforce compliance with its rules would be bombarded with an unending stream of petitions of objections relating to late filings or petitions

to determine the date of mailing, all of which would greatly hinder the administration of justice in the Supreme Court.

(2) RULE 6(e) IS NOT APPLICABLE TO APPEALS TO THE SUPREME COURT.

On pages 8 and 9 of appellant's brief, appellant constructs an argument which attempts to demonstrate that appellant actually had until December 16 in which to file Notice of Appeal. As we understand it, this argument consists of the following reasoning: Appellant argues that Rule 77(d) provides that the Clerk of the Court shall mail to the parties a notice of the entry of an order or judgment. The reasoning then proceeds that since the Clerk is supposed to send such an order by mail, one must assume that the order was mailed for purposes of computing time. The argument then proceeds to Rule 6(e), which provides that "whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon him, and the notice or paper is served upon him by mail, three days shall be added to the prescribed period." From here the reasoning proceeds as follows: That since the Order Denying Motion for New Trial was entered on November 13, the one-month period ended December 13, and if three days are added thereto December 16 becomes the time for filing the appeal.

There are a number of serious problems, however, with this reasoning. First of all, it is directly contrary to the statute. Appellant completely ignores the portions of Rule 77(d) which directly preclude his argument. We set forth Rule 77(d) in its entirety and underline the relevant portions thereof omitted by appellant.

"(d) Notice of Orders or Judgments. At the time of presenting any written order or judgment to the court for signing, the party seeking such order or judgment shall deposit with the clerk sufficient copies thereof for mailing as hereinafter required. Immediately upon the entry of an order or judgment the clerk shall serve a notice of the entry by mail in the manner provided for in Rule 5 upon each party who is not in default for failure to appear, and shall make a note in the docket of the mailing. Such mailing is sufficient notice for all purposes for which notice of the entry of an order is required by these Rules; but any party may in addition serve a notice of such entry in the manner provided in Rule 5 for the service of papers. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed."

It is readily seen that appellant has totally ignored the direct mandate of Section 77(d) that failure by the Clerk to send a notice of entry "does not affect the time to appeal or relieve or authorize the court to relieve a party from failure to appeal within the time allowed." Thus, even if the Clerk fails to send the notice of appeal, the appeal time remains unaffected.

In the instant case, the Clerk did not send a notice of entry of judgment; rather notice thereof was sent by counsel for the respondents. It is thus inescapable that appellant's argument runs squarely into, and is totally nullified by, the wording of Rule 77(d). Furthermore, Rule 6(e) provides that one is only entitled to the additional three days if one is to take a certain action within a prescribed period after service of a notice or other paper upon him. In the case of an appeal, the time for an appeal does not run after notice of entry of judgment, but rather runs after entry of judgment. It is therefore clear that Rule 6(e)

has no application to appeals.

Rule 73(a) provides:

> "When an appeal is permitted from a district court to the Supreme Court, the time within which an appeal may be taken shall be one month from the date of the entry... of the judgment or order appealed from unless a shorter time is prescribed by law . . . "

It is thus clear that the appeal time runs from the entry of the order or judgment—not from notice thereof. The rule is different with regard to an appeal from a city or justice court to the district court. Rule 73(h) provides:

> "An appeal may be taken to the district court from a final judgment rendered in a city or justice court within one month after notice of the entry of such judgment, or within such shorter time as may be provided by law."

Therefore, appellant's argument might have some validity for an appeal to the district court. It has no validity whatever with regard to the Supreme Court.

POINT II. THE DOCTRINE OF EXCUSABLE NEGLECT IS NOT APPLICABLE IN THIS CASE.

It should be noted that Rule 73(a) provides for a procedure to be followed in cases where there is "excusable neglect." That rule provides for a determination of the issue of excusable neglect by the district court where it is properly raised. The appellant has never claimed excusable neglect in this action; it has never been asserted, either in the lower court or in this court. There is a reference on page 8 of appellant's Reply Brief which states:

> "It was reasonable for defendant-appellant's counsel to expect that the Notice of Appeal mailed in the 10th of December . . . would be received and docketed by the clerk well before any appeal deadline."

Whether such an expectation was reasonable under all of the circumstances, and whether counsel was justified in relying on such an expectation or had some duty beyond such expectation, is not before this Court. Had there been excusable neglect, appellant could have filed a petition so alleging and had a hearing on that issue, but has never done that; it has never been sought either in the lower court or in this court. Had there been such a hearing, the lower court could have ruled on the issue and either party, aggrieved presumably, could have appealed the matter to this court for consideration. Under familiar doctrines of appellate review, however, where the matter has not been raised in the lower court, it is not available for review in this court.

On pages 10 and 11 of appellant's Reply Brief, appellant cites the cases of Aldabe v. Aldabe, 616 Fed 2d 1089 (9th Cir. 1980) and United States v. Solley, 545 Fed 2d 874 (3rd Cir. 1976). Appellant cites those cases for the proposition, and said cases hold, that notice of appeal is filed when it is received in the Clerk's office, not when it is docketed in some formal way. Appellant then goes on to state that:

> "Appellant was reasonably entitled to expect that it (the notice of appeal) was received in the Clerk's Office prior to the date on which it was entered on the docket."

We are not entirely certain what the appellant is saying

here, but if appellant is saying that he was entitled to expect that notice of appeal would be received in the Clerk's office earlier than it was, then his relief, if any, would have been under the provisions for excusable neglect. If appellant is saying that the notice of appeal was received in the Clerk's office earlier than it was docketed, that assertion is totally unsupported. In the absence of clear evidence to the contrary, the date stamped upon the notice of appeal must be presumed to be the date upon which it was received by the Clerk.

Therefore, Aldabe and Solley are not applicable under the facts of this case.

Sanchez v. Board of Regents, 625 Fed 2d 521 (5th Cir. 1980) is illustrative of the principle of excusable neglect, which has never been claimed by appellant, nor relief sought thereunder. In Sanchez the notice of appeal was mailed timely, but was filed out of time. Appellee moved for dismissal. The circuit court remanded the case to the district court for hearing on excusable neglect, which was a relief prayed for by appellant in the circuit court. This case was before this honorable court in January 1982 on respondents' Motion to Dismiss for lack of jurisdiction, and appellant did not request relief pursuant to the principle of excusable neglect, but elected to stand upon his assertion that his notice of appeal was timely filed under applicable law. The appellant has not sought such relief now and, indeed, having waited a year and having permitted briefs in this matter to be filed and

the case being now ready for oral argument, it would indeed be an imposition upon the Court and counsel to consider the factual issue of excusable neglect at this stage of the proceedings.

In The United States v. Nunley, 369 Fed. Supp. 171 (1973 D.C. Tenn), the court upheld the untimely filing of a notice of appeal, but did so upon the ground that the clerk's office to which the appeal was sent had been closed on two days when it should have been open, and for this reason decreed that the appeal was timely. The court stated:

> "Obviously, had such Winchester District office of the clerk been open with the deputy clerk in attendance in accordance with the established schedule, the defendant's notice of an appeal was mailed in time for the notice of appeal to have been filed by such deputy clerk within the required 10-day."

This case is cited by appellant, but reaffirms the position of respondent that filing means actual receipt by the office of the Clerk and not mailing, and in appropriate cases relief can be sought under the principles of excusable neglect. Relief pursuant to excusable neglect has never been asserted, nor claimed by the appellant, and the doctrine is inapplicable in this case.

CONCLUSION

For the reasons set forth herein, respondents respectfully pray that appellant's appeal be dismissed for lack of jurisdiction, or in the alternative that they be granted relief in accordance with the brief of respondents heretofore filed herein.

DATED this 3 day of February, 1983.

Respectfully submitted:

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Mailed two copies of the foregoing brief to M. Dayle Jeffs, attorney for appellant, at his address, 90 North 100 East, P. O. Box 683, Provo, Utah 84603, postage prepaid, this 3 day of February, 1983.